

1 THE HONORABLE JAMES L. ROBART
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9
10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT SEATTLE

13 MICROSOFT CORPORATION, a
14 Washington corporation,

15 Plaintiff,

16 v.

17 MOTOROLA, INC., MOTOROLA
18 MOBILITY LLC, and GENERAL
19 INSTRUMENT CORPORATION,

20 Defendants.

21 No.: 2:10-1823-JLR

22 DECLARATION OF KEITH P. GRAY IN
23 SUPPORT OF NON-PARTY VIA
24 LICENSING CORPORATION'S MOTION
25 TO SEAL TRIAL EXHIBITS

26 **NOTE ON MOTION CALENDAR:**

Keith P. Gray declares as follows:

1. I am an Intellectual Property Licensing Attorney at Via Licensing Corporation
2. (“Via Licensing”). I reviewed the documents produced by Via Licensing in the present
lawsuit. I make this declaration based upon my personal knowledge.

2. To help facilitate the efficient performance of electronic devices, Standard
Setting Organizations promulgate international compliance standards. Compliance with
these standards could potentially require the use of numerous patented technologies. Via
Licensing helps with commercialization of the standardized technology by developing and
administering patent licensing programs or “patent pools.” That is, Via Licensing identifies

1 entities who hold patents essential to conformance with the applicable standard and joins
 2 those patents into a single licensing program. Such a program enables manufacturers and
 3 sellers of electronic devices to efficiently license patents from multiple patent owners
 4 through one agreement, rather than engaging in separate negotiations and agreements with
 5 each individual patent owner.

6 3. Via Licensing's creation of patent licensing programs involves multiple steps.

7 First, Via Licensing must identify entities holding patents to technologies necessary to
 8 comply with the applicable standard. Entities interested in participating in the programs
 9 submit patents believed to be essential to the standard to an independent third-party expert,
 10 who evaluates the patents and determines whether the submitted patents are essential to
 11 compliance with the applicable standard.

12 4. Next, entities owning essential patents enter into an agreement, known as an
 13 Interim Licensing Committee Agreement ("ILCA"), with Via Licensing. The ILCA governs
 14 the relationship between the essential patent owners and Via Licensing, while Via Licensing
 15 and the patent owners develop the business and contractual terms of the program. Once the
 16 program is completed and ready for launch, the patent owners and Via Licensing enter into a
 17 separate agreement authorizing Via Licensing to license the essential patents of the licensors
 18 to the marketplace. This separate agreement is known as the Commercialization Agreement
 19 ("ComAg").

20 5. Throughout this development process, both Via Licensing and the licensors
 21 treat all information regarding the licensing program as highly confidential, understanding
 22 that disclosure of this information to any third party is prohibited. Both the ILCA and the
 23 ComAg contain confidentiality provisions. These provisions expressly provide for
 24 information exchanged between Via Licensing and the licensors to remain confidential
 25 throughout the development and administration of the patent licensing program.

26 6. Following the execution of the ComAg, Via Licensing offers a Patent License

1 Agreement (“PLA”) to interested entities that manufacture or sell products that comply with
 2 the applicable standard. Under the PLA, the licensees obtain the right to practice the
 3 essential patents of the licensors. The PLAs are standard, non-negotiable agreements, that
 4 Via Licensing offers to the market.

5 7. One of the industry standards for which Via Licensing developed a patent pool
 6 licensing program is the Institute of Electrical and Electronics Engineers (“IEEE”) 802.11
 7 standard at issue in this litigation. The 802.11 standard defines a system for extending
 8 Ethernet networking through wireless means, requiring the utilization of numerous essential
 9 patented technologies. Via Licensing acts as an agent for some of the patent owners and
 10 facilitates licensing of these patent owners’ essential patents, necessary for devices to comply
 11 with the 802.11 standard.

12 8. During the course of discovery in this lawsuit, Via Licensing was served with
 13 subpoenas at its headquarters in San Francisco, California, requiring it to produce
 14 documents. Via Licensing complied with the subpoenas and took reasonable steps to
 15 maintain the confidentiality of the responsive documents, labeling each as follows:

16 VIA LICENSING’S CONFIDENTIAL FINANCIAL INFORMATION
 17 OUTSIDE ATTORNEYS’ EYES-ONLY SUBJECT TO PROTECTIVE
 18 ORDER[.]

19 9. Less than two weeks ago, on Friday October 26, Via Licensing received a
 20 letter identifying Via Licensing’s documents that the parties intend to offer and admit at trial.
 21 Attached at pp. 8 to 10 is a true and a correct copy of that letter. In response, Via Licensing
 22 reviewed the proposed trial exhibit list and determined that several of its documents should
 23 be sealed. These documents contain highly-sensitive and confidential information, including
 24 trade secrets, that will irreparably damage Via Licensing if they are made available to Via
 25 Licensing’s competitors and the public. Thus, Via Licensing hired local counsel at its own
 expense to prepare and file a motion to seal.

26 10. In this case, Via Licensing produced slides from a PowerPoint presentation

1 given in Paris, France, regarding Via Licensing's 802.11 licensing program—i.e., the 802.11
 2 Licensing Committee PowerPoint presentation. This presentation provided a report to
 3 licensors holding essential 802.11 patents licensed under the program. The PowerPoint
 4 slides were marked “confidential” and were presented to the program licensors for discussion
 5 during the Paris meeting, which was conducted pursuant to the terms of the ComAg,
 6 including its confidentiality provisions. These slides, in particular, divulge frank assessments
 7 of prospective licensees, marketing tactics, litigation strategies, and Via Licensing's and the
 8 licensor's future business development plans. The presentation also contained highly-
 9 sensitive information about specific licensees, including Via Licensing's perspectives,
 10 opinions, and strategies about those named licensees.

11 11. In addition to the PowerPoint presentation described above, Via Licensing also
 12 produced agreements with its licensors—the executed 802.11 ILCAs and the executed
 13 802.11 ComAg. These documents contain royalty sharing terms, licensing strategies, and
 14 other highly-sensitive information critical to the success of Via Licensing's business. They
 15 also identify the terms and conditions governing the relationship between Via Licensing and
 16 the 802.11 program licensors under which the essential patent owners agreed to join the
 17 licensing program. Via Licensing and these patent owners expect that the terms of these
 18 agreements will remain confidential, understanding that disclosure to third parties is
 19 prohibited.

20 12. Via Licensing has spent significant time and resources refining the procedure
 21 and license documents for its licensing programs, including the 802.11 licensing program.
 22 Much of that effort will be undermined if it becomes known to Via Licensing's competitors.

23 13. The parties in this case have identified as trial exhibits several emails internal
 24 to Via Licensing. These emails reveal Via Licensing's confidential marketing, and
 25 negotiation strategies. In addition, the emails include discussions of royalty rates, royalty
 26 sharing terms, and other confidential licensing details. Public disclosure of this information

1 would enable competitors to undermine Via Licensing's relationships with its licensors—
2 relationships that Via Licensing has been fostering for years. Likewise, the candid
3 assessments of prospective licensees contained in the emails could sour Via Licensing's
4 relationships with potential customers, costing it additional licensees in the future, and
5 placing Via Licensing at a competitive disadvantage in the marketplace.

6 I declare under penalty of perjury under the laws of the United States that the
7 foregoing is true and correct.

8 DATED: November 8, 2012, at San Francisco, California.

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10 By: 
11 Keith P. Gray
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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2012, I electronically filed the foregoing with the Clerk of the Court using the e-filing system which will send notification of such filing to the persons listed below:

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10 Dated: November 8, 2012

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October 26, 2012

Via Email -- Tcarlson@rjo.com

Mr. Thomas Carlson
Rogers Joseph O'Donnell
311 California Street
San Francisco, CA 94104

RE: Microsoft Corp. v. Motorola, Inc., et al, Civ. No. 10-cv-1823 (W.D. Wash.)

Dear Mr. Carlson,

On June 6, 2011, Microsoft Corporation served a subpoena duces tecum on Via Licensing requesting that Via Licensing produce certain categories of documents relevant to the above-entitled action. Microsoft served a second subpoena duces tecum on Via Licensing on March 8, 2012. In response to those subpoenas, Via Licensing produced a number of documents that it designated as containing Via Licensing's confidential business information under the terms of the protective order in place in the above-entitled action.

Trial in this action is scheduled to begin November 13, 2012. It is possible that one of the parties may seek to introduce into evidence documents designated by Via Licensing as confidential. The Court has informed the parties that it will not allow evidence to be introduced under seal unless a showing has been made that "compelling reasons" exist to maintain such documents under seal. *See Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006).

The parties have identified the following documents produced by Via Licensing as potential trial exhibits:

- VL000001-26
- VL000027-49
- VL000050-74
- VL000075-100
- VL000101-126

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- VL000127-149
- VL000150-175
- VL000176-201
- VL000202-227
- VL000228-253
- VL000254-293
- VL000359-402
- VL000406-418
- VL000419-421
- VL000294-358
- VL000422-434
- VL000435-437
- VL000438-450
- VL000451-464
- VL000465-477
- VL000478-491
- VL000703-705
- VL000720-722
- VL000902-910
- VL000911-919
- VL000934-940
- VL000941-953
- VL000972-975
- VL10001-10021
- VIA10155-156
- VIA10198-225
- VIA10226-227

The Court has ruled that to the extent any third party such as Via Licensing wishes to have documents sealed if introduced at trial, the third party must file a motion to that effect pursuant to Local Rule W.D.Wash. 5(g). Absent such a motion (which of course may or may not be granted), the Court will not seal any such document, which will result in its being part of the public record.

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Should you have any questions, please feel free to call.

Very truly yours,

CALFO HARRIGAN LEYH EAKES LLP



Shane P. Cramer

SPC:sc

cc: Richard Cederoth
Ellen Robbins